

NO. 49224-5-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

WASHINGTON PUBLIC EMPLOYEES ASSOC. et al.,

Appellants,

v.

WASHINGTON STATE CENTER FOR CHILDHOOD DEAFNESS
AND HEARING LOSS, et al.,

Respondents.

STATE RESPONDENTS' OPENING BRIEF

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At issue in this appeal is the application of four enumerated exemptions within the Public Records Act (PRA), two asserted protections as “other statutes” incorporated into the PRA, and finally two asserted constitutional protections to PRA requests made of 46 state agencies and community colleges (collectively agencies) for the names, birthdays and work email addresses of employees represented by various unions. These exemptions and asserted protections are advanced by the Appellants in an attempt to prevent the release of the records requested by the Freedom Foundation (Foundation).

The first of the four asserted enumerated PRA exemptions to the release of records is whether there is sufficient linkage between the record and fundraising activities to prohibit release due to commercial purpose under RCW 42.56.070(9). The second asserted PRA exemption is whether the release of names, dates of birth, and work email addresses is exempt personal information under RCW 42.56.230(3), the release of which is highly offensive to a reasonable person and is not of a legitimate public concern. Third is whether the same information is exempt from release as records submitted for a driver’s license or identicard under RCW 42.56.230(7)(a). Fourth, and the final enumerated PRA exemption asserted, is whether members of the Service Employees International Union Local 1199NW (SEIU 1199NW) work in criminal justice facilities

so that their months and years of birth are exempt under RCW 42.56.250(8).

Next the Court is asked whether two non-PRA statutory provisions constitute exemptions incorporated into the PRA through RCW 42.56.070(1) as an “other statute.” The Appellants assert that through the release of requested records, the Foundation is asking the agencies to misuse state resources in violation of state ethic laws. RCW 42.52.160(1) and 180(1). The Appellants also assert the agencies would be committing an unfair labor practice through the release of public records because a typical employee could reasonably see the agency action as discouraging union activity. RCW 41.80.110(1)(a). There is no guidance from any Washington appellate court on these issues.

Finally, the Court is asked whether two constitutional provisions protect the release of records. The Appellants assert that release of represented employee information is akin to the release of membership lists and therefore protected freedom of association under Article 1, Section 5 of the Washington Constitution. They also assert an exemption under Article I, Section 7 of the Washington Constitution, arguing it provides greater protection for personal privacy than the PRA. There is no guidance from any Washington appellate court on these issues.

The state agencies did not identify any of these asserted exemptions applicable to these requests. They determined the requested records should be produced and would have done so had they not been restrained by order of the superior court. The agencies are prepared to produce the records if directed or permitted to do so by the Court.

I. STATEMENT OF THE CASE

On April 7, 2016, Foundation employee Jami Lund made requests to the agencies for the first name, middle initial, last name, birthdate and work email address of employees represented by various bargaining units. Clerk's Papers (CP) 123-124¹. All of the bargaining units identified in the requests are formed under the authority of the Personnel System Reform Act (PSRA), RCW 41.80.

Each agency that received the request identified a responsive record comprised of a list generated from electronic records. As authorized in RCW 42.56.540, agencies provided notice to employees of the request and of the intent to release records if not enjoined. CP 128-129. In general, unions representing the bargaining units also received notice from the agencies. CP 1327. The agencies did not identify any exemption that would block disclosure of the requested records.

¹ Lund submitted separate requests to each agency or community colleges identifying specific bargaining unit. The request, at CP 123-124, is demonstrative of the requests. The only difference between the requests is the receiving agency and identification of the agency bargaining unit(s).

On or about April 20, 2016, Teamsters Local Union No. 117 (Teamsters), Washington Federation of State Employees (WFSE), International Brotherhood of Electrical Workers Local 76 (IBEW), United Association Local 32 (UA), Washington Public Employees Association Local 365 (WPEA), Professional & Technical Employees Local 17 (PTE), and SEIU 1199NW (collectively the Appellants) filed Complaints to enjoin state agency respondents from releasing the records. CP 22-29, 1469-1476, 2020-2026, 2787-2793, 3616-3625. Thurston County Superior Court Nos. 16-2-01547-34, 16-2-01573-34, 16-2-01826-34, 16-2-01875-34, and 16-2-01749-34.

The trial court granted Preliminary Injunctions in these matters. CP 186-87. Though not consolidated by the trial court, all five matters were aligned on the trial court's docket, with a unified briefing schedule and a hearing date for permanent injunction. CP 398-400. At the close of the hearing held on July 29, 2016, the trial court denied the Appellants' motions for permanent injunction. CP 1443-1447. The cases were timely appealed to this Court and subsequently consolidated into the present action.

The Appellants sought temporary relief from the Court to stay release of all the information in the records to the Foundation. By Ruling dated August 16, 2016, as clarified on August 17, 2016, Commissioner

Schmidt found there was not a debatable issue as to names and work email addresses and did not stay their release. He did however find that there was a debatable issue regarding whether employees' dates of birth are exempt and enjoined their release. The names and work email addresses have been released but the dates of birth continue to be withheld.

II. ARGUMENT

A. Standard of Review

Judicial review of agency action under the PRA, including application of an exemption, is *de novo*. RCW 42.56.550(3). The burden of proof is on the party seeking to prevent disclosure to show that an exemption applies. *Ameriquest Mortg. Co. v. Office of Atty. Gen.*, 177 Wn.2d 467, 486, 300 P.3d 799 (2013). In this case, that burden falls on the Appellants.

In general, a trial court's decision whether to grant an injunction is reviewed for abuse of discretion. *Kucera v. State, Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63, 68 (2000). The trial court's decision exercising that discretion will be upheld unless it is based upon untenable grounds, or is manifestly unreasonable, or is arbitrary. *King v. Riveland*, 125 Wn.2d 500, 515, 886 P.2d 160, 169 (1994). To obtain injunctive relief—preliminary or permanent—the Appellants must establish three basic requirements: (1) they have a clear legal or equitable right; (2) they

have a well-grounded fear of immediate invasion of that right by the entity against which they seek the injunction; and (3) the acts about which they complain are either resulting or will result in actual and substantial injury. *Kucera*, 140 Wn.2d at 200. If the Appellants fail to satisfy any one of these three requirements, the injunction should be denied. *Federal Way Family Physicians v. Tacoma Stands Up for Life*, 106 Wn.2d 261, 265, 721 P.2d 946, 948 (1986). At the preliminary injunction hearing, the moving party need only establish the *likelihood* that it will ultimately prevail on the merits—not the ultimate right to a permanent injunction. *Tyler Pipe Indus., Inc. v. State Dep’t of Rev.*, 96 Wn.2d 785, 793, 638 P.2d 1213, 1217 (1982).

Overlaying this general standard for an injunction is the standard in RCW 42.56.540, which specifically governs the court’s power to enjoin production of a record under the PRA. *Bainbridge Island Police Guild v. City of Puyallup*, 172 Wn.2d 398, 407 n.2, 259 P.3d 190, 194 (2011). “Under RCW 42.56.540, a court may enjoin production of requested records if an exemption applies and examination would clearly not be in the public interest and would substantially and irreparably damage any person, or would substantially and irreparably damage vital governmental functions.” *Robbins, Geller, Rudman & Dowd, LLP v. State*, 179 Wn. App. 711, 719, 328 P.3d 905, 910 (2014).

B. The Intended Use of Records, as Communicated to State Agencies, Did Not Reveal a Prohibited Commercial Purpose

RCW 42.56.070(9) prohibits an agency from releasing lists of individuals requested for commercial purposes. Generally speaking, agencies may not distinguish between requestors, but in the specific case of commercial purpose agencies may inquire as to the future use of requested documents. *SEIU Healthcare 775NW v. Dep't of Soc. & Health Servs.*, 193 Wn. App. 377, 400-09, 377 P.3d 214, *review denied*, 186 Wn.2d 1016 (2016). This issue is resolved on a case-by-case determination based on the identity of the requester, the nature of the records requested, and any other information available to the agency. *Id.*

At minimum, agencies must at least require a party requesting a list of individuals to state the purpose of the request. *Id.* In this case, the Foundation indicated the purpose of the request was “to inform employees of their constitutional rights.” CP 2302. The Appellants argue that the intent of the Foundation is to leverage their success in this case to get more donations.

Where there is a clear purpose other than commercial benefit, a remote and ephemeral potential commercial benefit does not prohibit release. *SEIU Healthcare 775 NW*, at 12 (citing 1975 Op. Att’y Gen. No. 15, at 13). The record indicates that the Foundation plans on reaching

out to current union members, to give them information regarding how the Foundation sees the employee's current legal rights and may direct them to their website for further information. While its website does have links for those people motivated to donate to do so in order to assist the Foundation in its ideological campaign against state government unions, fundraising materials that publicize the acquisition and use of provider information is not a direct use of the information to generate revenue. *SEIU 925 v. Freedom Foundation*, 2016 WL 7374228 (§ 25.) The agencies did not identify a sufficiently close nexus such as to require the agencies to withhold release of the requested lists.

C. No Exemption Was Revealed by a Review of Information Within the Four Corners of the Records

Washington courts have consistently directed that an agency determine an exemption applies based on information within the four corners of the record. *Predisik v. Spokane Sch. Dist. No. 81*, 182 Wn.2d 896, 906, 346 P.3d 737 (2015); *Koenig v. City of Des Moines*, 158 Wn.2d 173, 187, 142 P.3d 162 (2006); *King Cty. v. Sheehan*, 114 Wn. App.325, 341, 57 P.3d 307 (2002). An agency must construe exemptions narrowly in favor of disclosure to achieve the PRA's paramount purpose of open government. *Predisik*, 182 Wn.2d at 902. Guided by that principle, the

state agencies did not identify exemptions applicable to the records in question.

1. The release of requested information would not violate an individual's right to privacy

Personal information is exempt from disclosure only to the extent that disclosure would violate the individual's right to privacy. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 164 Wn.2d 199, 212, 189 P.3d 139 (2008); RCW 42.56.230(3). The right to privacy from the Restatement (Second) of Torts § 652D (1977) applies to public records cases. *Predisik*, 182 Wn.2d at 911.

The right to privacy under the PRA has been held to be very narrow, extending only to matters concerning an individual's private life that are not exposed to the public eye, such as sexual relations, family quarrels, or the most intimate personal letters. *Id.* at 904-05. The Restatement (Second) of Torts § 652D specifically states that date of births are not private. *See* Restatement (Second) of Torts § 652D, (1977) ("Thus there is no liability for giving publicity to facts about the plaintiff's life that are matters of public record, such as the date of his birth . . ."). As the information requested did not fit the narrow definition of privacy under the Restatement (Second) of Torts § 652D (1977), the agencies concluded that the information was not exempt under RCW 42.56.230(3).

a. The requested information was not exempt under the specific privacy clause of RCW 42.56.250(3)

As the requested information was not exempt under the general privacy exemption of the PRA, a review of the specific privacy exemption is necessary. That review establishes that those exemptions also do not apply to the information in this case. RCW 42.56.250(3) states:

The following information held by any public agency in personnel records, public employment related records, volunteer rosters, or included in any mailing list of employees or volunteers of any public agency: Residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, driver's license numbers, identicard numbers, and emergency contact information of employees or volunteers of a public agency, and the names, dates of birth, residential addresses, residential telephone numbers, personal wireless telephone numbers, personal electronic mail addresses, social security numbers, and emergency contact information of dependents of employees or volunteers of a public agency.

RCW 42.56.250(3). The plain language of the statute evidenced the Legislature's intent to exempt the birthdates of *dependents* of employees, but not the birthdates of the state employees themselves. *See State v. Stately*, 152 Wn. App. 604, 607-08, 216 P.3d 1102, (2009) ("When faced with an unambiguous statute, we discern the Legislature's intent from the plain language alone."). The Legislature's intent to not exempt birthdates of

state employees is further supported by the other exemptions in RCW 42.56.250. In 2010 the Legislature passed RCW 42.56.250(8) which exempts the birth month and year of employees and workers of criminal justice agencies. *State v. Roggenkamp*, 153 Wn.2d 614, 624–25, 106 P.3d 196 (2005) (in interpreting statutes, courts presume that the Legislature does not include superfluous language). RCW 42.56.230(3) predates RCW 42.56.250(8) and the latter would not have been necessary under the Appellants assertion. Therefore, based on the plain reading of RCW 42.56.250(3), the agencies did not identify the information requested as exempt from disclosure.

b. Only employees of criminal justice agencies receive a month and year of birth exemption, which does not apply to the Special Commitment Center (SCC), Western State Hospital, or Eastern State Hospital

RCW 42.56.250(8) exempts the month and year of birth in the personnel files of employees and workers of criminal justice agencies as defined in RCW 10.97.030 is exempt from disclosure. *See* RCW 42.56.250(8). RCW 10.97.030(5) defines a criminal justice agency as a court or “a government agency which performs the administration of criminal justice pursuant to a statute or executive order and which allocates a substantial part of its annual budget to the administration of criminal justice.”

In the Department of Social and Health Services (DSHS), the Juvenile Rehabilitation Administration (JRA) serves Washington State's highest-risk youth who are committed to JRA custody by county juvenile courts. These youth typically have committed many lower-level offenses or have committed a serious crime. See <https://www.dshs.wa.gov/ra/juvenile-rehabilitation> (last visited January 8, 2017). DSHS found the exemption applicable to for SEIU 1199NW-represented employees working at the JRA facilities. DSHS, however, has not found that exemption applicable to its other departments. CP 3748-3749.

The SCC undertakes DSHS's responsibility to provide treatment to individuals under a civil commitment order based on the State's Sexually Violent Predator law. See *In re Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993) (superseded by statute on other grounds). Similarly, Western and Eastern State Hospitals are not incarcerating individuals that have been charged with a crime. These state hospitals have the responsibility to evaluate patients and restore competency when possible. RCW 10.77.060, *Trueblood v. Washington State Dep't of Soc. and Health Servs.*, 822 F.3d 1037, 1039 (2016), CP 2277 - 2281.

In arguing that RCW 42.56.250(8) applies to DSHS' other departments, the Appellants rely on the general dictionary definition of "rehabilitation." Appellants' Opening Brief at 28. However, the dictionary

also provides another definition when specifically discussing “rehabilitation” in the criminal justice context. “Rehabilitation” is also defined as “to restore (as a convicted criminal defendant) to a useful and constructive place in society through therapy, job training, and other counseling.” (<http://www.merriam-webster.com/dictionary/rehabilitation>). Therefore, when discussing criminal justice agencies, rehabilitation is about the re-integration into society of a convicted person to counter habitual offending, also known as criminal recidivism. *See, e.g. Wright v. State*, 670 P.2d 1090, 1093 (Wyo. 1983) (“Rehabilitation results in reformation.”). DSHS does not see its role at the SCC, Eastern State Hospital, nor Western State Hospital as fitting into the definition of criminal justice agency and did not identify RCW 42.56.250(8) as a viable exemption. DSHS’ role is not the rehabilitation of the criminally convicted offender, but rather the therapeutic evaluation and treatment of individuals facing criminal charges to determine whether that person mental condition is such that he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in preparing a defense.

2. The Requested Information Is Not Exempt Driver’s License or Identicard Application Records

RCW 42.56.230(7)(a) exempts “any record used to prove identity, age, residential address, social security number, or other personal

information required to apply for a driver's license or identicard." This exemption was added to the PRA in 2008 as part of the creation of the state's Enhanced Driver's License (EDL) program. Substitute H. B. 2719. 60th Leg., Reg. Sess., 2008, Wash. Sess. Laws. Issuance of an EDL requires applicants to provide a heightened level of documentation to establish proof of identity and citizenship. Engrossed Substitute H. B. 1289. 60th Leg., Reg. Sess., 2007, Wash. Sess. Laws. The agencies are in possession of the requested information due to an employment relationship. While the Department of Licensing issues driver's licenses and identicards, the records at issue here are the product of the employment relationship with its represented employees, not of applications for a driver's license or identicard. Further, the requested information, in its list format, would not be considered a record "to prove identity, age, residential address, social security number, or other personal information required to apply for a driver's license or identicard." The agencies did not find RCW 42.56.230(7)(a) an applicable exemption.

D. No Court Has Held That the State Ethics and Labor Laws Qualify as Exemptions under the PRA

The PRA allows for records to be withheld if they fall within any other statute which exempts or prohibits disclosure of specific information or records. RCW 42.56.070(1), *White v. Clark County*, 188 Wn. App. 622,

630-31, 354 P.3d 38 (2015). The asserted exemption may not be implied.

Id. at 631. The “other statute” must explicitly identify an exemption. *Id.*

Nothing in either of the asserted statutory schemes led the agencies to identify state ethics laws or labor laws as an exemption. Appellants assert grounds for an injunction based on new legal theories that have not heretofore been addressed by any Washington court of record, and they were rejected by the trial court. Specifically, Appellants argued that release of records by the agencies under the PRA would constitute interference with employee rights granted under the PSRA, RCW 41.80 , and would also violate the state ethics laws, RCW 42.52. In the absence of established law on point, the agencies did not identify these as applicable exemptions through the “other laws” incorporation provision of the PRA, RCW 42.56.070(1).

E. No Court Has Held That Personal Rights Such as Constitutional Association and Privacy Rights Are Exemptions Under the PRA

Finally, the Appellants assert that disclosure of the requested records would violate constitutional association and privacy rights. To date, no Washington appellate court has recognized these exemptions.

There is no doubt that a constitutional exemption from the PRA would have to be accommodated by the PRA, presumably as an “other statute” under RCW 42.56.070(1). But the constitutional exemptions

Appellants assert have not yet been recognized by Washington courts, and they do not yet constitute an exemption that state agencies can cite to withhold requested records.

Even if Washington courts had recognized a constitutional association right or a privacy right available for state employees or others to assert as an exemption in a public records case, the agencies likely could not have asserted it on their behalf. Constitutional rights generally are personal, and the agencies would be unable to assert a represented employee's constitutional rights in their stead. *See In re Marriage of Akon*, 160 Wn. App 48, 59, 248 P.3d 94, 99 (2011); *Rakas v. Illinois*, 439 U.S. 128, 138, 99 S. Ct. 421, 428, 58 L.Ed.2d 387 (1978).

III. CONCLUSION

In responding to the public records requests at issue here, the agencies found no statutory or other exemption that applied to the records. They would have produced them to the requester had the agencies not been enjoined from release, and they did release those portions of records that the courts permitted. The agencies remain ready to produce the

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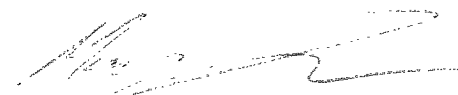
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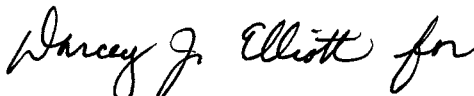
remaining portion of the requested records at such time as it is permitted
or directed to do so by the courts.

RESPECTFULLY SUBMITTED this 22 day of January, 2017.

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I certify under penalty of perjury under the laws of the state of
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DATED this 20 day of January, 2017, at Olympia, WA.


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WASHINGTON STATE ATTORNEY GENERAL

January 20, 2017 - 4:21 PM

Transmittal Letter

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